

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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Rx USA INTERNATIONAL, INC,

Plaintiff,

- against -

SUPERIOR PHARMACEUTICAL CO. d/b/a  
RXBAZAAR, INC. d/b/a FPP DISTRIBUTORS,  
INC., C. ROBERT CUSICK, ROBERT  
CAWTHORN, HANDEL EVANS, SHIKAR  
GHOSH, WOLF & CO., P.C., FOLEY, HOAG  
& ELLIOTT, LLP, WEST AMERICAN  
INSURANCE COMPANY and OHIO  
CASUALTY INSURANCE COMPANY,

**MEMORANDUM  
OPINION and ORDER**

CV 04-5074 (TCP)

Defendants.

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PLATT, District Judge:

Defendants Foley, Hoag & Elliott, LLP (“Foley”) and Wolf & Co.,  
P.C. (“Wolf”) (collectively “Defendants”), move to dismiss Plaintiff Rx USA’s  
 (“Rx USA”) sixteenth and seventeenth claims pursuant to Federal Rule of Civil  
 Procedure (“Rule”) 12(b)(2) on the ground that this Court lacks personal  
 jurisdiction. Foley also moves to dismiss Rx USA’s sixteenth claim pursuant to  
 Rule 12(b)(6) on the grounds that Rx USA fails to state a claim. For the  
 following reasons, Defendants’ motions to dismiss are **DENIED**.

**BACKGROUND**

Rx USA is a New York corporation licensed to engage in the  
 wholesale distribution of prescription medication in New York and throughout the

several states. Rx USA alleges that it is an unsecured creditor of Defendant RxBazaar (“RxBazaar”). RxBazaar is an Ohio corporation licensed to practice wholesale and/or retail pharmacy with its principal place of business in Cincinnati, Ohio. Foley is a law firm with its principal place of business in Boston, Massachusetts. Foley’s clients include multinational corporations and corporations doing business in New York. Wolf is a Massachusetts based certified public accounting and business consulting firm. Wolf is one of the largest CPA firms in New England and has clients with offices located throughout the United States.

Rx USA filed a complaint on November 23, 2004. In the complaint, Rx USA claims, among other things, that in November, 2002 RxBazaar misrepresented in financial statements filed with the Securities and Exchange Commission (“SEC”) that certain pharmaceutical products that it sold were compliant with Federal and New York regulations.

RxBazaar was a client of the Defendants. Rx USA alleges that the Defendants aided in RxBazaar’s defrauding of Rx USA because they “intentionally, willfully, wantonly, recklessly and/or grossly negligently failed to use reasonable and prudent care in certifying the lawful business practices of defendant RX BAZAAR and preparing defendant RX BAZAAR’s SEC form 10KSB [“the 10-K form”] and 10QSB Report” (collectively “the SEC forms”). Rx USA further alleges that it relied on these forms when extending credit to, and

otherwise doing business with, RxBazaar between November 27, 2003 and August 3, 2004.

On July 7, 2005, Foley and Wolf moved to dismiss under Rule 12(b)(2), arguing that this Court may not assert personal jurisdiction over them. Foley also filed a Rule 12(b)(6) motion, arguing that Rx USA failed to state a claim upon which relief can be granted.

## **DISCUSSION**

### **I. Defendants' Motion to Dismiss for Lack of Personal Jurisdiction**

A plaintiff opposing a motion to dismiss pursuant to Rule 12(b)(2) has the burden of establishing the court's jurisdiction over the defendant. *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990). A plaintiff may defeat these motions "by pleading in good faith . . . legally sufficient allegations of jurisdiction, i.e., by making a '*prima facie* showing' of jurisdiction." *Jazini v. Nissan Motor Co., Ltd.*, 148 F.3d 181, 184 (2d Cir. 1998) (citations omitted). Courts must accept as true all of the factual allegations set out in the complaint, and draw inferences from those allegations in the light most favorable to the plaintiff. *Alnwick v. European Micro Holdings Inc.*, 281 F. Supp. 2d 629, 637 (E.D.N.Y. 2003).

A district court has much discretion in how it decides a pretrial motion to dismiss for lack of personal jurisdiction.

It may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary

hearing on the merits of the motion. If the court chooses not to conduct a full-blown evidentiary hearing on the motion, the plaintiff need make only a prima facie showing of jurisdiction through its own affidavits and supporting materials. Eventually, of course, the plaintiff must establish jurisdiction by a preponderance of the evidence, either at a pretrial evidentiary hearing or at trial. But until such a hearing is held, a prima facie showing suffices, notwithstanding any controverting presentation by the moving party, to defeat the motion.

*Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981) (citations omitted).

Federal courts examining a motion to dismiss for lack of personal jurisdiction conduct a two-part inquiry. First, the court considers whether state law supports the exercise of jurisdiction. Second, the court determines whether the exercise of jurisdiction would be permissible under the Due Process Clause of the Fourteenth Amendment. *Bensusan Rest. Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997).

Rx USA asserts that this Court has personal jurisdiction over Wolf and Foley under New York Civil Practice Law and Rules (“CPLR”) § 302(a)(3)(ii) (2005) and implies that this court has jurisdiction pursuant to CPLR § 301.<sup>1</sup> (Pl.’s Opp. Mem. Wolf ¶¶ 5-6, 20-24; Pl.’s Opp. Mem. Foley at 2-3, 7-8). Rx USA also asserts that the exercise of personal jurisdiction is permissible under the Due Process Clause. (Pl.’s Opp. Mem. Wolf at ¶¶ 15-29; Pl.’s Opp. Mem. Foley at 7-13). These arguments are assessed below.

A. 302(a)(3)(ii) (The *LaMarca* Test)

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<sup>1</sup> As this Court extends personal jurisdiction over the Defendants under CPLR § 302(a)(3)(ii) (2005), it does not reach the question of whether jurisdiction exists under Section 301.

Section 302 of the CPLR states in relevant part:

Personal jurisdiction by acts of non-domiciliaries:

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: . . .

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . . .

In *LaMarca v. Pak-Mor Mfg. Co.* 95 N.Y.2d 210 (N.Y. 2000), the New York Court of Appeals developed a five-part test for determining whether Plaintiff has established jurisdiction under Section 302(a)(3)(ii).

First, that defendant committed a tortious act outside the State; second, that the cause of action arises from that act; third, that the act caused injury to a person or property within the State; fourth, that defendant expected or should reasonably have expected the act to have consequences in the State; and fifth, that defendant derived substantial revenue from interstate or international commerce.

*Id.* at 214.

1. *Defendant committed a tortious act outside the state*

Neither Foley nor Wolf dispute Rx USA's assertion that the Defendants committed the alleged negligent certification of the documents outside New York.

*2. The cause of action arises from the act*

This element is also undisputed. However, Foley makes a related argument that Rx USA fails to state a cause of action. This argument will be addressed in the section discussing Foley's 12(b)(6) motion. *See infra* pt. II.

*3. The act caused injury to a person or property within the state*

Wolf argues that the injury occurred outside New York because the critical events, i.e. the alleged negligence, occurred in Massachusetts. (Wolf Reply Mem. at 5). Wolf cites *United Bank of Kuwait, PLC v. James M. Bridges, Ltd.*, 766 F. Supp. 113, 116 (S.D.N.Y. 1991), for the proposition that "the situs of a nonphysical commercial injury is where the critical events associated with the dispute took place." However, Wolf conducts the wrong analysis. Courts examining cases involving misrepresentations have held that the injury occurs where it is "immediately felt." *Hargrave v. Oki Nursery, Inc.*, 636 F.2d 897, 900 (2d Cir. 1980). In *Hargrave*, plaintiff, a New York company, bought vines from the defendant, a California company, relying on defendant's promise that the vines would be healthy. After the vines were shipped, plaintiff discovered they were diseased. *Id.* at 899. The Second Circuit held that the plaintiff's injury was "immediately felt" in New York because plaintiffs were domiciled and doing business there, and because plaintiffs were situated in New York when they

received the misrepresentations. *Id.* at 900.

Here, Rx USA's claims are based on alleged misrepresentations made by RxBazaar which were negligently certified by the Defendants. Accordingly, personal jurisdiction is best analyzed under New York's law of tortious misrepresentation. Like the plaintiff in *Hargrave*, Rx USA is domiciled and doing business in New York. (*See* Compl. ¶ 1). New York is also the state where Rx USA allegedly received the misrepresentations from RxBazaar. (*See* Compl. ¶ 1, 17). Lastly, New York is the location where plaintiff allegedly "lost sales, lost opportunity and diminution of overall good will and reputation . . ." (Compl. ¶ 121). These allegations demonstrate that the situs of the injury is New York and thus, the third element of the *LaMarca* test is satisfied.<sup>2</sup>

4. *Defendant expected or should reasonably have expected the act to have consequences in the state*

Rx USA argues that Wolf and Foley should have anticipated its reliance on the SEC forms. (Pl.'s Opp. Mem. Wolf ¶ 14; Pl.'s Opp. Mem. Foley at 4). The Defendants contend that they had no knowledge Rx USA would rely on these reports because Rx USA was neither a party to nor a beneficiary of any engagement between the Defendants and RxBazaar. (Foley Mem. Mot. Dismiss at 2; Wolf Mem. Mot. Dismiss at 5).

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It is irrelevant that RxBazaar and not Wolf actually sent the alleged misrepresentations into New York (Wolf Reply Memo at 3). *See Cleopatra Kohlique, Inc., v. New High Glass, Inc.*, 652 F. Supp. 1254, 1251-56 (holding that plaintiff's injury occurred in New York, even when defendant did not directly send the misrepresentations into the state).

“The test of whether a defendant expects or should reasonably expect his acts to have consequences within the state is an objective rather than subjective one.” *Allen v. Auto Specialties Mfg. Co.*, 357 N.Y.S.2d 547, 550 (N.Y. App. Div. 1974). The New York Court of Appeals has held that “the defendant need not foresee the specific event that produced the alleged injury; rather it need only reasonably foresee that any defect in its product would have direct consequences within the State.” *LaMarca*, 95 N.Y.2d at 215. Here, Defendants need not foresee the actual harm to Rx USA from RxBazaar’s misrepresentations, they need only foresee potential harm in New York. Thus, the Defendants’ repeated denials of contact with the Plaintiff are irrelevant.

Rx USA contends that Defendants could have foreseen harm in New York in part because RxBazaar did not conduct business in all fifty states; instead, the company worked only in “a small circle of states.” (Transcript of Oral Argument at 26, *Rx USA v. Superior Pharmaceutical Co. et al.*, July 15, 2005, CV-04-5074 [hereinafter Transcript]). Foley and Wolf offer a number of counter arguments, which shall be taken in turn.

(a) Foley

Foley asserts that “Plaintiff has alleged no reasonable basis on which Foley should have expected any reliance by, or other consequences to, a New York entity from its provision of legal services to RxBazaar.” (Foley Mem. Mot. Dismiss at 7). In fact, Rx USA has alleged numerous facts demonstrating that Foley should have expected such reliance. First, Rx USA alleges that Foley



acted as a business reference for RxBazaar. (Pl.'s Opp. Mem. Foley at 3). Foley, in essence, attested to the soundness of RxBazaar's business practices to all potential partners, including New York partners. Courts have found such attestations to be a valid ground for personal jurisdiction. *See BHC Interim Funding L.P. v. Bracewell & Patterson*, 2003 WL 21467544, at \*7 (S.D.N.Y. June 25, 2003) (extending personal jurisdiction over defendant law firm where firm wrote positive opinion letter concerning lender's finances and plaintiff extended credit in partial reliance on the letter).

Second, Rx USA alleges that the 10-K forms Foley certified are regularly relied on by investors and potential creditors in the normal course of business. (Pl.'s Opp. Mem. Foley at 4). As RxBazaar's investors and creditors were fixed in a small circle of states, this Court may reasonably infer that Foley knew the reports would be relied upon by New York businesses.

(b) Wolf

Wolf argues that the only tie between it and New York is that Rx USA happens to be a resident of New York, and that this tie is insufficient grounds for personal jurisdiction. (Wolf Reply Mem. at 3). Wolf relies on *United Bank of Kuwait*, 766 F. Supp. 113 [hereinafter *UBK*], to support its claim. In *UBK*, defendant accountants, ("Bridges"), completed a financial audit for their client, Southern Atlantic, in Virginia. Plaintiff, a New York business, relied on the audit in lending \$2,000,000 (two million) in funds to Southern Atlantic. Southern Atlantic defaulted on the loan. United Bank of Kuwait then sued

Southern Atlantic and Bridges. The Court refused to extend personal jurisdiction over Bridges, holding that the accountants did not have sufficient ties to New York.

Admittedly, the facts in *UBK* are similar to the facts here. Nonetheless, *UBK* is easily distinguishable for two reasons. First, *UBK* involved publication of one audit report to the Plaintiff. *See id.* at 114. Clearly, one report given to a New York business does not demonstrate strong ties to New York. In contrast, Wolf prepared RxBazaar's SEC forms, documents which were likely relied on by many businesses. Thus, the potential for ties to New York is much greater here than in *UBK*. Second, in *UBK*, the motion to dismiss was brought after discovery, when the burden on the plaintiff to establish personal jurisdiction becomes considerably greater. For instance, allegations alone are no longer sufficient to rebut a defendant's motion to dismiss. *Id.* at 115. Here, no discovery has been taken and thus Rx USA may satisfy its burden by alleging facts that would establish jurisdiction if proved true. *See Ball*, 902 F.2d at 197; (Transcript 32).

Rx USA has alleged facts sufficient to meet its burden. For instance, Rx USA alleged that 10-K reports such as the one certified by Wolf are generally relied on by a company's commercial partners. (Pl.'s Opp. Mem. Wolf ¶ 14) Because such reliance occurs in the normal course of business, logic suggests that Wolf knew its reports would be relied on by RxBazaar's business partners. Furthermore, like Foley, Wolf acted as a reference for RxBazaar. As

noted above, courts have found such attestations valid grounds for personal jurisdiction. *See BHC*, 2003 WL 21467544, at \*7; *supra* p. 8.

5. *Derived substantial revenue from interstate or international commerce*

For purposes of this analysis, Rx USA demonstrates that the Defendants derive a substantial portion of their revenue from interstate and international commerce. Courts have held that a fairly small amount of revenue may be “substantial.” *See BHC*, 2003 WL 21467544, at \*18 (finding that substantial revenue existed where 14% of the defendant’s revenue came from out-of-state sources). Furthermore, substantial revenue does not require a company to have extensive contacts outside its home state. *See Foot Locker Retail, Inc v. SBH, Inc.*, 2005 WL 91306, at \*5 (S.D.N.Y. Jan. 18, 2005) (finding defendant derived substantial revenue from interstate commerce in part because the company’s agents traveled twice a year to footwear industry shows out of state).

Here, Foley’s web site states that the firm’s clients include multinational corporations such as McDonald’s, General Motors, and PriceWaterhouse Coopers. (Pl.’s Opp. Mem. Foley, Ex. D). Foley’s clientele also includes corporations which appear to be based out of state, such as United Jersey Bank and Public Service of New Hampshire. (*Id*). Lastly, Foley has numerous clients registered with the New York State Division of Corporations. (*Id*). Based on these admissions, this Court finds Foley derives substantial revenue from sources outside Massachusetts.

Wolf's web site also demonstrates that much of its business involves interstate commerce. The web site states:

Wolf & Company, P.C . . . [has] one of the largest financial institutions practices in New England . . . Many of our clients have multiple locations throughout the United States, while others have a foreign parent or subsidiary. As a member of a worldwide consortium of regional accounting firms, we are well equipped to help them deal with the issues associated with foreign operations or a multi-state reporting environment.

(Pl.'s Opp. Mem Wolf, Ex. A).

Wolf's web site clearly indicates it performs audits for a national client base. Accordingly, Wolf derives substantial revenue from interstate commerce.

Thus, this Court finds that Rx USA has met its burden of establishing personal jurisdiction over the Defendants pursuant to 302(a)(3)(ii). It remains to be seen whether this exercise of personal jurisdiction comports with Due Process requirements.

B. Due Process

The Due Process Clause permits a state to exercise personal jurisdiction over a non-resident defendant who has had "certain minimum contacts with [the forum state], such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted). The Second Circuit has held that the Due Process analysis has two components, "the minimum contacts inquiry and the reasonableness inquiry." *Metropolitan Life Ins. v.*

*Robertson Ceco-Corp.*, 84 F.3d 560, 567 (2d Cir. 1996).

1. *Minimum Contacts*

The Supreme Court distinguishes between “general” and “specific” jurisdiction when conducting a minimum contacts analysis, either of which is an adequate basis for personal jurisdiction. Here, Foley demonstrates minimum contacts through general jurisdiction while Wolf demonstrates them through specific jurisdiction.

For a defendant to have minimum contacts under a general jurisdiction analysis, the contacts must be “continuous and systematic.” *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448 (1952). As noted above, Foley has numerous corporate clients who conduct business in New York. *See supra* p. 12. Furthermore, Foley recruits employment candidates in New York. (Pl.’s Opp. Mem. Foley at 8). Courts have found that minimum contacts existed in situations where companies had similar or lesser ties. *See Marine Midland Bank v. Keplinger & Associates, Inc.*, 488 F. Supp. 699, 704 (S.D.N.Y. 1980) (holding sufficient contacts existed where the president of defendant company had traveled to New York and the company worked with several New York corporations); *Regency Capital, LLC v. Corpfinance Intern., Inc.*, 2003 WL 22400200, at \*2 (S.D.N.Y. Oct 20, 2003) (holding minimum contacts existed where corporation admitted doing business in New York on internet web site and letterhead).

Specific jurisdiction exists where “a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant’s

contacts with the forum.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 413, 414-16 (1984). A single act by a corporate defendant directed at the forum may be enough to give rise to specific personal jurisdiction if the act gives rise to the claim being asserted. *Youn v. Trak*, 324 F.3d 409, 419 (6th Cir. 2003) (citing *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)).

The specific act that establishes jurisdiction here is Wolf’s certification of RxBazaar’s 10-K reports. Rx USA alleges that Wolf had specific knowledge that these 10-K reports would be relied on by New York investors and businesses. (Pl.’s Opp. Mem. Wolf ¶ 14). Rx USA’s allegation rings true because such reliance is normal business practice. Moreover, this allegation must be taken as true for purposes of this motion.

## *2. Reasonableness*

In conducting an inquiry into the reasonableness of an exercise of personal jurisdiction, federal courts in this Circuit consider the following five (5) factors: (1) the burden on the defendant, (2) the forum state’s interest in adjudicating the dispute, (3) the plaintiff’s interest in obtaining convenient and effective relief, (4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering substantive social policies.” *Metropolitan Life*, 84 F.3d at 568 (citing, *inter alia*, *Asahi Burger King v. Rudzewicz*, 471 U.S. 462, 476-77 (1985)). Rx USA argues that all five factors weigh in its favor. The Defendants fail to address these factors.

(a) Burden on the defendant

In evaluating this factor, it is important to note that “the conveniences of modern communication and transportation ease what would have been a serious burden only a few decades ago.” *Metropolitan Life*, 84 F.3d at 574. The Defendants’ burdens are further eased because Boston and New York are in the same region and easily traversed. Furthermore, as both Defendants have boasted of their national client base, they are likely accustomed to working outside of Massachusetts. Thus, out of state litigation should not place an overwhelming burden on either Defendant.

(b) Forum state’s interest in adjudicating the dispute

New York has a strong interest in resolving this matter because Rx USA is a resident of New York and was injured in New York. *See Photoactive Productions, Inc. v. Al-Or Int’l, Ltd.*, 99 F. Supp. 2d 281, 290 (E.D.N.Y. 2000) (“New York has an undeniable interest in providing redress to its own citizens”).

(c) The remaining factors

Plaintiff has a strong interest in obtaining convenient and effective relief in New York. If Rx USA could not bring the case in this state, it would have to bring a separate action against the defendants at great cost. Furthermore, if liability were apportioned against Wolf and Foley in a separate action, there might be conflicting judgments.

In evaluating whether extending personal jurisdiction will result in the efficient administration of justice, courts will “generally consider where

witnesses and evidence are likely to be located.” *Metropolitan Life*, 84 F.3d at 574. Here, this factor is a wash. While witnesses and evidence concerning the extent of Plaintiff’s damages are completely located within New York, evidence of liability attributable to the defendants will be located in a number of states.

The final factor involves considering the policy interests of the several states. Neither party has put forth policies that would be furthered or undermined by permitting this case to go forward in New York. Thus, this factor does not weigh in either party’s favor.

After due consideration of these factors, this Court finds the exercise of personal jurisdiction over Foley and Wolf is reasonable and holds that such exercise comports with Due Process requirements.

## **II. Foley’s 12(b)(6) Motion**

In order to prevail under Rule 12(b)(6), a defendant must show that the plaintiff can prove no set of facts in support of its claim which would entitle plaintiff to relief. *Alnwick*, 281 F. Supp. 2d at 637. Courts must accept as true all of the factual allegations set out in the complaint, and draw inferences from those allegations in the light most favorable to the plaintiff. *Id.* (citing *Desiderio v. National Ass’n of Sec. Dealers, Inc.*, 191 F.3d 198, 202 (2d Cir. 1999)). “Under Rule 12(b)(6), a court must confine its consideration to “facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the



complaint by reference, and to matters of which judicial notice may be taken.”

*Allen v. WestPoint Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991).

Here, Rx USA claims that Foley “intentionally, willfully, wantonly, recklessly and/or grossly negligently failed to use reasonable and prudent care in certifying the lawful business practices of defendant RxBazaar. . .” (Complaint ¶ 113). Foley responds that (1) Massachusetts law governs this claim, and (2) under Massachusetts law, Rx USA fails to allege an attorney-client relationship or any other relationship giving rise to a duty Foley must perform. (Foley Reply Mem. at 8-9). These arguments will be taken in turn.

#### A. Choice of Law

A federal court, sitting in diversity, must look to the choice-of-law rules of the state in which it sits. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). New York conducts an “interest analysis” to determine the jurisdiction which has the greatest interest in the litigation. *See Babcock v. Jackson*, 12 N.Y.2d 473, 482 (N.Y. 1963). Foley incorrectly posits that Massachusetts has the greatest interest in the litigation because the alleged tortious conduct occurred in Massachusetts. The New York Court of Appeals has ruled that a state does not have “a controlling concern or interest” merely because the tortious conduct arose there. *See id.* at 480-81. Other factors must be considered, including the location of the plaintiff’s residence and the site where the injury occurred. *Id.* at 481-82. Here, Rx USA is a resident of New York and

the company also was injured there. (*See supra* pp. 1, 6-7). Thus, on balance, New York has the greatest interest in this litigation and it is New York law which should apply.

B. Foley's Duties to Rx USA

Initially, Foley correctly argues that it does not owe Rx USA a duty under an attorney-client relationship because Foley never acted as the Plaintiff's attorney. (Foley Mem. Mot. Dismiss at 13). Foley then incorrectly contends that it owes no other duty to Rx USA because duties to third party nonclients only arise if an attorney has "actual knowledge" that "a particular plaintiff will rely" on his services. (*Id.* at 14).

Section 552(1) of the Restatement (Second) of Torts states that a professional has a duty to a third party to use at least due care when giving information that the third party "justifiably relies" upon. Under this section, there is no requirement that the lawyer have "actual knowledge" of the third party's reliance.<sup>3</sup> *Id.*

Like the Restatement, New York law has no absolute

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Section 552(1) of the Restatement (Second) of Torts states:

Information Negligently Supplied For The Guidance Of Others

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

requirement that an attorney have actual knowledge of reliance by a third party. The Second Circuit has held that an attorney may be held liable to third parties if it is shown that he “did something either tortious in character or beyond the scope of his honorable employment.” *Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1080 (C.A.N.Y. 1977) (citations omitted); *see also Singer v. Whitman & Ransom*, 442 N.Y.S.2d 26, 27 (N.Y. App. Div. 1981) (holding that while generally an action against attorney by nonclient third party will not lie, an attorney may be liable for injuries sustained by third party as consequence of attorney’s improper conduct, such as where attorney committed a wrongful or malicious act).

Here, Rx USA accuses Foley and Wolf of tortious conduct, alleging gross negligence as well as malicious and intentional failure to use prudent care. (Complaint ¶¶ 113, 121). These claims are valid under New York law. Furthermore, plaintiff has alleged a set of facts which give support to its claim. *See supra* pp. 8-9. Thus, Rx USA has brought a claim upon which relief may be granted.

### **Conclusion**

Personal jurisdiction over Defendants Foley and Wolf is warranted given the facts alleged in Rx USA’s Complaint and the supporting affidavits and other documents provided. Furthermore, Rx USA asserts a valid claim against Foley.

Accordingly, Defendants' 12(b)(2) motions to dismiss for lack of personal jurisdiction and Foley's 12(b)(6) motion to dismiss for failure to state a claim are hereby **DENIED**.

**SO ORDERED.**

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Thomas C. Platt, U.S.D.J.

Dated: Central Islip, New York  
December 6, 2005